

LEE CHUIE SIANG

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v.

PUBLIC FINANCE BHD

HIGH COURT MALAYA, MELAKA

B

LOW HOP BING J

[CIVIL APPEAL NO: 1-12-53-2003]

22 MARCH 2006

HIRE PURCHASE: Breach of agreement - Contractual conditions - Failure to fulfill - Whether plaintiff, as hirer, was in breach of contractual conditions - Plaintiff unable to exercise option to purchase car - Whether plaintiff duly performed all stipulations - Whether plaintiff precluded from invoking cl. 14 of agreement against defendant

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HIRE PURCHASE: Hire purchase agreement - Plaintiff in possession of car for three years - Effected payment for relevant consideration - Whether plaintiff unable to rely on doctrine of failure of consideration

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HIRE PURCHASE: Breach of agreement - Default in paying arrears of instalments - Whether defendant served requisite notices on plaintiff - Hire Purchase Act 1967, ss. 43(c), 44

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This was an appeal by the appellant-plaintiff ("the plaintiff") against the decision of the Sessions Court judge ("the trial judge") dismissing the plaintiff's claim and allowing the counterclaim of the respondent-defendant ("the defendant"). The facts were that on 1 March 1997, the parties executed a hire-purchase agreement ("the agreement"), the plaintiff being the hirer and the defendant the owner. The goods was a Honda Civic 1.6. Pursuant to the agreement, the plaintiff made payments of deposit and monthly instalments. The plaintiff was able to register the car, pay the road tax and used it for a continuous period of two years, nine months and twelve days until 12 January 2000, when it was discovered that the car had sustained serious damages in the third accident, whereby the engine, bumper and bonnet had to be replaced. However, when the plaintiff sent the car for inspection at the Melaka Road Transport Department ('the Melaka RTD') in order to apply for a replacement registration card for the car as the original card was allegedly missing, she was informed by the Melaka RTD of some problems with the car, thereby warranting an investigation by the technical control and supervision division

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- A (“the division”) of the department in Petaling Jaya. A report confirmed substantial structural changes to the car *viz* the front portion of the car was found to have been welded and rejoined from two dissected parts, and its chassis number had been tampered with. As a result, pursuant to s. 17(1)(b) of the Road
- B Transport Act 1987, the car could not be registered and consequently, the plaintiff could not use it on the road. Hence, she alleged that she had suffered losses. *Vide* a solicitor’s letter dated 20 April 2000, the plaintiff terminated the agreement and demanded the refund of RM70,687 (when the actual sum was
- C RM73,654 as pleaded in the statement of claim), in addition to storage charges of RM30 daily commencing 7 May 2000 until the defendant takes repossession of the car. The defendant, however, had declined to accede to the plaintiff’s demand. The issues that arose were (1) whether, on the facts, the plaintiff as hirer had
- D been in breach of the contractual conditions; (2) whether defendant was in breach of cl. 14 of the agreement as the plaintiff was unable to exercise the option to purchase the car which was now non-registrable and non-transferable; (3) whether the non-registration of the car on 12 January 2000 and its consequential
- E unusability constituted a failure of consideration, relying on ss. 57(2) and 66 of the Contracts Act 1950 and (4) whether the defendant was entitled to the counterclaim.

Held (dismissing the appeal):

- F (1) Upon execution of the agreement on 1 March 1997 and subsequently until 12 January 2000, the defendant had a good title to pass and had indeed passed the title to the plaintiff by having the car registered in the name of the plaintiff who
- G during this entire period had been using the car without any legal impediment whatsoever. The defendant could not be attributed with any responsibility for the plaintiff’s subsequent conduct and actions consequent upon the third accident which brought about the aforesaid structural changes to the car.
- H Indeed, had the car not met with the third accident, its original merchantable quality would not have been an issue and so there could have been no doubt that the defendant would have been able to pass a good title to the plaintiff. Further, as hirer, the plaintiff’s obligation to keep the car in good repair and condition and to notify the defendant as
- I owner in the event of the car suffering any damage, was

expressly stated in cl. 6.1.1 in the agreement. The plaintiff was also prohibited from *ie*, altering the identifying number or mark on the car under cl. 6.1.6 of the agreement. There was no evidence adduced at the trial to prove that the plaintiff had ever fulfilled any of the express conditions contained in the aforesaid two clauses. The failure on the part of the plaintiff in this regard clearly constituted the plaintiff's breach thereof. (paras 19, 21, 22, 23 & 24)

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(2) Upon a plain reading of cl. 14, it was clear that the plaintiff's exercise of the option to purchase the car was upon the plaintiff's fulfillment of the condition precedent *ie*, if the plaintiff had duly performed all the stipulations and conditions in the agreement on her part to be performed and observed. The plaintiff had been in breach of cl. 6.1.1. and cl. 6.1.6 and so was precluded from invoking cl. 14 against the defendant. (paras 28 & 29)

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(3) The plaintiff had been in possession and had been using the car for almost three years during which she had effected payments for the relevant instalments, until its unusability was brought about by the third accident which resulted in the structural changes to the car. Hence, the plaintiff was unable to rely on the doctrine of failure of consideration. (para 37)

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(4) Upon the plaintiff's default in paying the arrears of instalments under the agreement, the defendant had served the requisite notice on the plaintiff on 8 March 2000. This was followed by the defendant's reminder notice dated 16 March 2000 served by registered post on the plaintiff. These notices were sent to the plaintiff's address which the plaintiff had given the defendant and was incorporated into the agreement. As the notices have been sent to the plaintiff in the manner prescribed in s. 43(c) of the Hire-Purchase Act 1967, they constituted *prima facie* proof under s. 44 which the plaintiff had not rebutted. (para 43)

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[Decision of trial judge hereby affirmed.]

Case(s) referred to:

Karflex Lte v. Poole [1993] 2 KB 251 (*refd*)

Public Finance Bhd v. Ehwon Saring [1996] 1 CLJ 628 HC (*refd*)

United Manufacturers Sdn Bhd v. Sulaiman Ahmad & Anor [1989] 1 MLJ 482 (*refd*)

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Yeoman Credit Ltd v. Apps [1962] 2 QB 508 (*refd*)

A Legislation referred to:

Contracts Act 1950, ss. 57(2), 66
Hire-Purchase Act 1967, ss. 7(4), 43(c), 44
Road Transport Act 1987, s. 17(1)(b)

B *For the plaintiff - Ikram Muzakhir Cheah; M/s Soo Thien Ming & Nashrah*
For the defendant - Ravinathan Muthiah; M/s Ravi Muthiah & Co

Reported by Suhainah Wahiduddin

JUDGMENT

C Low Hop Bing J:

Appeal

D [1] This is the appeal by the appellant-plaintiff (“the plaintiff”) against the decision of the learned sessions court judge (“the trial judge”) who had on 6 November 2003 dismissed with costs the plaintiff’s claim and allowed with costs the respondent-defendant’s (“the defendant’s”) counterclaim.

Finding Of Facts

E [2] After a full hearing, the trial judge arrived at the following finding of facts.

F [3] The parties have on 1 March 1997 executed a hire-purchase agreement (“the agreement”), the plaintiff being the hirer and the defendant the owner. The goods was a Honda Civic 1.6 used motorcar bearing registration No. JEJ 4935, engine No. D15B2044430 and chassis No. EG81019142 (“the car”).

G [4] Pursuant to the agreement, the plaintiff made payments of deposit and monthly instalments amounting to RM73,654.65 as at January 2000.

H [5] The car was sourced by the plaintiff’s younger brother (SP5) from a friend, one Ah Jien, in a shop whose name SP5 cannot remember now. When SP5 bought the car in early 1997, he did not ascertain the conditions, background or the original owner of the car. The hire-purchase facility was given by the defendant on the basis of the documents produced by the said Ah Jien. Without any hitch, the plaintiff was able to register the car, pay the road tax and use it for a continuous period of two years, nine

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months and 12 days until 12 January 2000, when it was actually discovered that the car had sustained serious damages in the third accident, whereby the engine, bumper and bonnet had to be replaced.

[6] However, on or about 12 January 2000 when the plaintiff sent the car for inspection at the Melaka Road Transport Department (“the Melaka RTD”) in order to apply for a replacement registration card for the car as the original card was allegedly missing, she was informed by the Melaka RTD of some problems with the car, thereby warranting an investigation by the technical control and supervision division (“the division”) of the department in Petaling Jaya.

[7] *Vide* letter dated 14 March 2000 the Melaka RTD served on the plaintiff a report dated 2 March 2000 issued by the division pertaining to the result of the investigation.

[8] The report confirmed substantial structural changes to the car *viz.* the front portion of the car was found to have been welded and rejoined from two dissected parts, and its chassis number has been tampered with. As a result, pursuant to s. 17(1)(b) of the Road Transport Act 1987, the car could not be registered and consequently the plaintiff could not use it on the road. Hence, she alleged that she has suffered losses.

[9] The plaintiff’s evidence confirmed that there were substantial structural changes to the car which had been in the workshop for five months for the purpose.

[10] On 27 March 2000, the plaintiff lodged Batu Berendam police report No. 1016/2000 and informed the defendant’s assistant manager of the same.

[11] *Vide* solicitor’s letter dated 20 April 2000, the plaintiff terminated the agreement and demanded the refund of RM70,687 (when the actual sum was RM73,654.65 as pleaded in the statement of claim), in addition to storage charges of RM30 daily commencing 7 May 2000 until the defendant takes repossession of the car. The defendant has declined to accede to the plaintiff’s demand.

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A Merchantable Quality

[12] It was submitted by Mr. Ravinathan Muthiah, defendant's learned counsel, that as the car could not be registered until today, it was not of merchantable quality as the defendant was unable to give a valid title to the plaintiff.

[13] Learned counsel Mr. Ikram Muzakhir Cheah responded for the plaintiff that on the date of the execution of the agreement, the defendant was able to give a valid title to the plaintiff as it was registered in her name on 28 February 1997 and that the plaintiff had been using the car until the third accident, in which case cl. 6.1.1 and 6.1.6 of the agreement would apply.

[14] A reference hereinafter to a clause is a reference to that clause in the agreement while a reference to a section is a reference to that section in the Hire-Purchase Act 1967 unless the context otherwise requires.

[15] In my judgment, the opposing submissions may be resolved by considering the nature and content of the agreement which must be construed in the light of the applicable case law and the Hire-Purchase Act 1967.

[16] In *Karflex Limited v. Poole* [1993] 2 KB 251, Lord Goddard J held that in a hire-purchase agreement, the plaintiff as the owner of the car was under an express condition to pass the property therein to the hirer at any moment after the execution of the agreement when the hirer chose to pay the full purchase price, whether by means of instalments or by a lump sum, and that where the car bought from a third party was found to be stolen and no title could pass as the third party had obtained possession dishonestly, the owner in the hire-purchase agreement was found to be in breach of the condition.

[17] *Karflex, supra*, was applied by Mohd Ghazali J (now JCA) in *Public Finance Bhd v. Ehwan bin Saring* [1996] 1 CLJ 628 where his Lordship held that s. 7(4) has preserved the common law position that the owner must have a good title to pass when he entered into a hire-purchase agreement. Hence, where after six weeks the hire-purchase agreement was executed, the car was seized by the Customs and Excise Department for an alleged offence, and had not been returned to either party, thereby

making it impossible for the owner to pass a good title to the hirer, the owner was held to have occasioned a breach of a condition of the agreement.

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[18] It is appropriate for me to observe that the facts in the above two authorities concern the non-transferability of the car, in the first case due to theft, and in the second case the alleged commission of an offence, which had respectively resulted in the breach of condition by the owner. Having regard to the plaintiff's submission along the line of these two authorities, I am of the view that the issue raised for immediate consideration at this stage is: "Whether on the facts the plaintiff as hirer has been in breach of the condition?".

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[19] On the facts, it is plain that upon execution of the agreement on 1 March 1997 and subsequently until 12 January 2000, the defendant had a good title to pass and has indeed passed the title to the plaintiff by having the car registered in the name of the plaintiff who during this entire period had been using the car without any legal impediment whatsoever. In my view, the defendant could not be attributed with any responsibility for the plaintiff's subsequent conduct and actions consequent upon the third accident which brought about the aforesaid structural changes to the car. Indeed, had the car not met with the third accident, its original merchantable quality would not have been an issue and so there could have been no doubt that the defendant would have been able to pass a good title to the plaintiff.

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[20] In the circumstances, unlike *Karplex, supra*, and *Ehwan bin Saring, supra*, I am unable to find any breach of the express condition pertaining to the defendant's ability to pass a good title to the plaintiff.

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[21] Further as hirer, the plaintiff's obligation to keep the car in good repair and condition and to notify the defendant as owner in the event of the car suffering any damage, has been expressly stated in cl. 6.1.1 in the following terms:

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6.1 The Hirer shall for the duration of this agreement:

6.1.1 at his own cost and expenses *keep the Goods in good repair and condition* to the satisfaction of the owner ... In the event of the Goods suffering any damage the Hirer *shall forthwith* and before incurring any expense in connection with the repair thereof *notify the owner* ... (emphasis added)

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- A [22] The plaintiff is also prohibited from eg, altering the identifying number or mark on the car, under cl. 6.1.6 which reads as follows:

6.1 The Hirer shall for the duration of this agreement:

- B 6.1.6 keep the Goods in his possession and not conceal the Goods or *to alter them or any identifying number or mark thereon.* (emphasis added)

- C [23] There was no evidence adduced at the trial in the court below to prove that the plaintiff has ever fulfilled any of the express conditions contained in the aforesaid two clauses. The failure on the part of the plaintiff in this regard clearly constitutes the plaintiff's breach thereof.

- D [24] Had the plaintiff fulfilled these contractual conditions, the title to and hence the merchantable quality of the car would have continued to remain intact and inviolable.

Option To Purchase

- E [25] It was asserted for the plaintiff that the defendant was in breach of cl. 14 of the agreement as the plaintiff was unable to exercise the option to purchase the car which is now non-registrable and non-transferable.

- F [26] The defendant took the position that it was the plaintiff who was in breach of the agreement.

- G [27] In my judgment, the answer to the above conflicting submissions have been given in the preceding issue entitled "merchantable quality". In addition, I would make reference to cl. 14 which, where relevant, reads:

XIV. Option To Purchase

- H 14. ... if the Hirer shall duly perform and observe all the stipulations and conditions in this Agreement on his part to be performed and observed ... the Hirer shall have an option of purchasing the Goods and upon exercising such option of purchasing the Goods ...

- I [28] Upon a plain reading of cl. 14, it is abundantly clear that the plaintiff's exercise of the option to purchase the car is upon the plaintiff's fulfilment of the condition precedent ie, if the plaintiff has duly performed all the stipulations and conditions in the agreement on his part to be performed and observed.

[29] As stated earlier in the preceding issue, the plaintiff has been in breach of cl. 6.1.1 and cl. 6.1.6 and so is precluded from invoking cl. 14. A

Failure Of Consideration

[30] It was stressed for the plaintiff that the non-registration of the car on 12 January 2000 and its consequential unusability constituted a failure of consideration, relying on ss. 57(2) and 66 of the Contracts Act 1950. B

[31] The defendant contended to the contrary. C

[32] In my judgment, it is instructive to observe that ss. 57(2) and 66 of the Contracts Act 1950 clearly relate to matters other than the doctrine of failure of consideration.

[33] For the avoidance of doubt, s. 57(2) of the Contracts Act 1950 is intended to render a contract void, when a contract to do an act subsequently becomes impossible or unlawful. It reads: D

57. Agreement to do impossible act.

(1) ... E

Contract to do act afterwards becoming impossible or unlawful.

(2) A contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. F

[34] Section 66 of the same Act provides for the obligation of a person who has received an advantage under a void agreement to make restitution, as follows: G

66. Obligation of person who has received advantage under void agreement, or contract that becomes void.

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. H

[35] The above two sections obviously come within the domain of the doctrine of frustration in the law of contract and the consequences that flow therefrom. I

- A [36] In relation to the failure of consideration in a hire-purchase agreement, I am not unmindful of the English Court of Appeal judgment in *Yeoman Credit Ltd. v. Apps*. [1962] 2 QB 508 CA. There, by a hire-purchase agreement, the hire-purchase company hired a car to the hirer, at an initial payment to be followed by
- B 30 monthly instalments. The defendant effected the initial payment. The car was in an unusable condition and required expenditure to put it to a reasonable condition. The hirer complained to the hire-purchase company about the car's condition, but kept the car and paid only three subsequent
- C instalments. The company determined the hiring, removed the car from the hirer's house and brought proceedings against the hirer for arrears of instalments and damages. The hirer counterclaimed for £170 paid under the agreement, alleging failure of consideration. The county court judge found for the hirer. On
- D appeal, Holroyd Pearce LJ disagreed and held that the hirer's use coupled with possession and continuance of the hire-purchase agreement debarred the hirer from saying that there was a total failure of consideration.
- E [37] The facts in the instant appeal bear a striking similarity in that the plaintiff has been in possession and has been using the car for almost three years during which she has effected payments for the relevant instalments, until its unusability was brought about by the third accident which resulted in the above structural
- F changes to the car. Hence, as in *Yeoman Credit, supra*, I am of the view that the plaintiff is unable to rely on the doctrine of failure of consideration.

Defendant's Counterclaim

- G [38] The plaintiff contended that the defendant is not entitled to the counterclaim as the defendant has not given the plaintiff a notice of demand for the sum pleaded in the counterclaim.
- H [39] It was argued for the defendant that, *inter alia*, the plaintiff had to pay the sum stated in the defendant's counterclaim, as the notice dated 1 March 2000 under the Fourth Schedule to the Hire-Purchase Act 1967 ("the notice") had been sent to the plaintiff on 8 March 2000 by registered post.

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[40] In my judgment, a proper perusal of the appeal record reveals that upon the plaintiff's default in paying the arrears of instalments under the agreement, the defendant has served the requisite notice on the plaintiff on 8 March 2000. This was followed by the defendant's reminder notice dated 16 March 2000 served by registered post on the plaintiff. These notices were sent to the plaintiff's address at 19 Jalan Sri Tanjung 6, Taman Sri Tanjung 76400 Tanjung Kling Melaka, which address the plaintiff has given to the defendant and was incorporated into the agreement.

[41] Clause 18 provides for the service of eg, a notice by one party to the other party in the manner prescribed by the Act.

[42] Section 43(c) provides for such a notice to be served, given or sent by posting it by registered post addressed to the hirer at his last known place of abode or business.

[43] As the above notices had been sent to the plaintiff in the manner prescribed in s. 43(c), they constitute *prima facie* proof, under s. 44 which the plaintiff has not rebutted.

[44] In *United Manufacturers Sdn Bhd v. Sulaiman bin Ahmad & Anor* [1989] 1 MLJ 482 where a hirer has, *inter alia*, fallen into arrears of hire rentals under a hire-purchase agreement, and has failed to comply with the Fourth Schedule notice served on him by the owner in accordance with s. 43(c), as in the instant appeal, Gunn Chit Tuan J (later CJ (M)) had no hesitation in entering summary judgment for the owner.

Conclusion

[45] It needs to be observed that the plight or predicament of the plaintiff could have been avoided if she had properly perused the agreement and fulfilled her contractual obligations. On the foregoing grounds, I hold that the decision of the trial judge is free from error and is hereby affirmed, with the result that this appeal is dismissed with costs.

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